No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the United States House of Representatives ("House"),[2] respectfully submits this brief because it has several compelling institutional interests in this case.

First, each State's representation in the House is apportioned based on decennial census data. Therefore, the chamber's very composition depends on an accurate and complete enumeration.

Second, census data guide the annual allocation of hundreds of billions of federal dollars to States and localities through programs enacted by Congress.

Third, this case directly implicates Congress's authority and obligations under the Constitution's Enumeration Clause, which imposes on Congress the duty to carry out an "actual Enumeration" of the whole number of persons in the United States through a decennial census. *See* U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. Congress enacted specific require-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for all parties received timely notice of the filing of this brief and consented to its filing.

[2] The Bipartisan Legal Advisory Group, which consists of the Speaker, Majority Leader, Majority Whip, Republican Leader and the Republican Whip, "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the House of Representatives, 116th Cong., *available at* https://rules.house.gov/sites/democrats.rules.house.gov/files/116-1/116-House-Rules-Clerk.pdf. The Republican Leader and the Republican Whip do not agree with the merits discussion in this brief.

ments in the Census Act, 13 U.S.C. §§ 1 *et seq.*, to advance the goal of achieving an actual enumeration of the U.S. population to the greatest extent possible and to ensure that Congress is able to fulfill its role in overseeing the process through timely notification by the Department of Commerce ("the Department") of all subjects and questions it intends to include in the decennial census questionnaire. *See* 13 U.S.C. § 141(f).

In attempting to add a question about citizenship status to the 2020 Census outside the agency's ordinary processes and against the undisputed evidence that doing so would undermine the most basic purpose of the decennial census, the Department has disregarded the Census Act's requirements and limitations. The district court conducted an extensive review of the Department's action as reflected in the administrative record and correctly concluded in an extraordinarily thorough ruling that the Department acted unlawfully in departing from the framework that Congress carefully established for the conduct of the census. The district court's conclusions here have since been confirmed by the ruling in *California v. Ross*, — F. Supp. 3d —, Nos. 18-cv-1865-RS, 18-cv-2279-RS, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019).

Accordingly, the House urges the Court to affirm the district court's decision.

SUMMARY OF ARGUMENT

The decennial census is a vital cornerstone of this nation's democratic institutions—none more so than the United States House of Representatives, which depends upon an accurate census count for the apportionment of its membership among the States, for the drawing of congressional districts, and for the proper allocation of federal dollars through programs that Congress has enacted. Given the enormous stakes surrounding the decennial census, the Constitution provides an intelligible standard to govern the process of counting the population. The Enumeration Clause requires the decennial census to be, to the greatest extent possible, an "actual Enumeration," a full count of all of the nation's inhabitants. U.S. Const., art. I, § 2, cl. 3; *see also id.* amend. XIV, § 2.

Recognizing the potential for "political abuse" inherent in the taking of the decennial census, the Framers "adopted the words 'actual Enumeration' to preclude the availability of methods that permit political manipulation." *Utah v. Evans*, 536 U.S. 452, 507 (2002). If the Constitution had left the method for conducting the decennial census "unfixt," partisan actors might be able to "use such a mode as will defeat the object" of the census and to "perpetuate . . . inequality." 1 *Records of the Federal Convention of 1787*, at 571 (Max Farrand, ed. 1911) (statement of Gouverneur Morris). The Enumeration Clause was thus intended to "shut[] the door to partiality or oppression." The Federalist No. 36, at 175 (Ian Shapiro ed., 2009) (Alexander Hamilton).

Through the Census Act, 13 U.S.C. §§ 1 *et seq.*, Congress has delegated the responsibility for carrying out the decennial census to the Department. 13 U.S.C. § 141(a). Although the Census Act undoubtedly grants

the Department broad discretion, that discretion is not so unfettered that it overcomes the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

Among the most important constraints on the Department is the constitutional lodestar of seeking an "actual Enumeration," a crucial safeguard against politicization of the decennial census. Congress has reinforced that essential limitation through the Census Act, mandating certain actions and proscribing those practices that, in its judgment, run contrary to the constitutionally defined goal of achieving an actual enumeration. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 819–20 (1992) (Stevens, J., concurring in part and concurring in the judgment) (noting that 2 U.S.C. § 2a(a), the apportionment statute, "embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment").

This Court and others already have recognized some of these statutory constraints. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (concluding that § 195 of the Census Act prohibits the use of sampling in the decennial census); *McNichols v. Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981) (holding that § 9 of the Census Act "make[s] abundantly clear that Congress intended . . . rigid immunity from publication or discovery" of census information so that "citizens [will] cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures").

This case involves two similar limitations. First, the Census Act precludes the Department from adding

questions to the decennial census when it can secure the desired information from federal, state, or local administrative records. 13 U.S.C. § 6(c). Second, the Act requires the Department to notify Congress regarding the "subjects" and "questions" that it intends to include in the decennial census and bars the Department from deviating from those absent "new circumstances" that "necessitate" a change in course. *Id.* § 141(f).

These statutory provisions provide clear, judicially reviewable limitations on the Secretary of Commerce's discretion to set the "form and content" of the decennial census. In adding a question about citizenship status to the 2020 Census despite the availability of more accurate administrative data and without proper notification to Congress, the Department violated both §§ 6(c) and 141(f). By doing so in the face of repeated warnings from the Census Bureau that adding a citizenship question would substantially decrease the self-response rate among households with at least one noncitizen, Secretary of Commerce Wilbur Ross also violated the Enumeration Clause itself.

For those reasons (among others), the district court correctly held that the addition of the citizenship question was unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* Pet. App. 9a–10a. As recognized by the district court in *California v. Ross*, — F. Supp. 3d —, Nos. 18-cv-1865-RS, 18-cv-2279-RS, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019), the Department also violated the Enumeration Clause. The House therefore urges the Court to affirm the district court's judgment.

ARGUMENT

I. CONGRESS HAS NOT DELEGATED UNREVIEWABLE DISCRETION TO THE DEPARTMENT IN ITS CONDUCT OF THE DECENNIAL CENSUS.

The Constitution's Enumeration Clause, as modified by the Fourteenth Amendment, confers upon Congress the responsibility to conduct every ten years an "actual Enumeration" of the "whole number of persons in each State." U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. Rather than administer the census itself, Congress has delegated to the Secretary of Commerce ("the Secretary") the task of "tak[ing] a decennial census of the population . . . in such form and content as he may determine." 13 U.S.C. § 141(a). This delegation in no way authorizes the Department to conduct the decennial census in a manner that undermines the constitutionally mandated goal of obtaining an actual enumeration, nor does it permit the Department to ignore the Census Act's limitations on the Department's discretion.

A. Both the Constitution and the Census Act Constrain the Department's Discretion as to the "Form and Content" of the Census.

The Department contends that the Secretary's decision to add a citizenship question to the 2020 decennial census "is committed to agency discretion by law" and is therefore unreviewable under the APA. 5 U.S.C. § 701(a)(2). In particular, the Department argues that § 141(a)'s delegation of authority to the Secretary to conduct the census "in such form and content as he may determine" provides no "standard by which to

judge the lawfulness of including (or excluding) a given question on the census form." Pet'rs' Br. 21–22.

The Department, however, has failed to overcome the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Section 701(a)(2) provides a "very narrow exception" to review under the APA, applicable only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citation and internal quotation marks omitted). The Department focuses on a single subsection of the Census Act to urge that its actions are unreviewable. But viewed in its proper context, the constitutional limitations of the Enumeration Clause and the Census Act as a whole make clear that this is not the "rare instance[]" where agency action is unreviewable under the APA. *See id.*

The Department's overly simplistic argument is twofold: First, it argues, Congress has "virtually unlimited discretion in conducting the 'actual Enumeration.'" *Wisconsin v. New York*, 517 U.S. 1, 19 (1996). Second, according to the Department, Congress delegated that same broad discretion to the Department in § 141(a), such that there is no law to apply to constrain the agency's conduct.

This argument fails to recognize that this Court has articulated a constitutional minimum by which the conduct of the census is to be judged. In *Wisconsin*, the Court held that the Enumeration Clause requires that the census be administered in a manner that "bear[s] . . . a reasonable relationship to the accomplishment of an actual enumeration of the population." 517 U.S. at 20. Moreover, in *Franklin v. Massachusetts*,

505 U.S. 788, 804 (1992), this Court reviewed a decision by the Census Bureau, examining whether it was "consistent with the constitutional language and the constitutional goal of equal representation." The constitutional limitation on Congress's discretion necessarily travels with its delegation of authority to the Department. *See Wisconsin*, 517 U.S. at 19 n.11 (assuming that "the Secretary's discretion . . . is commensurate with that of Congress" where the Census Act is silent on the Department's authority).

An example demonstrates this principle. No specific provision of the Census Act would bar the Commerce Department from using, in particular locations, a virtually unreadable font for the census questionnaire, or printing the form in red ink on green paper (to the detriment of the color blind). Although these choices might, on their face, appear to fall within § 141(a)'s grant of authority over the "form and content" of the census, surely such irrational choices—ones that undoubtedly would reduce self-response rates and accuracy and offer no offsetting benefits—would be constrained by the need to demonstrate "a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin*, 517 U.S. at 20.

Moreover, the surrounding provisions of the Census Act restrict the Department's authority under § 141(a). Indeed, this Court already has held that the Census Act confines the Department's discretion in determining the manner in which the decennial census is conducted—and, in doing so, concluded that the Department's actions are judicially reviewable. In *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), plaintiffs challenged the Department's planned use of statistical sampling in the 2000 Census under § 195 of the

Census Act. In that case, as here, the Department defended its decision about how to conduct the decennial census by invoking § 141(a)'s "broad general grant of authority." Brief for Appellants at 27, *Dep't of Commerce v. U.S. House of Representatives*, No. 98-404, 1998 WL 691297.[3] But this Court was unpersuaded, holding that § 141(a)'s "broad grant of authority . . . is informed . . . by the narrower and more specific § 195," and that the latter section of the Census Act "prohibits the use of sampling for apportionment purposes." *House of Representatives*, 525 U.S. at 338, 342.

The Department attempts to distinguish *House of Representatives* by arguing that § 195 "is judicially enforceable because a court can determine whether the Secretary has or has not engaged in impermissible sampling," whereas "neither the Census Act nor the Constitution provides any standard to guide a court's judgment of when the Secretary has exceeded his authority to take the decennial census 'in such form and content as *he* may determine.'" Pet'rs' Br. 27 (quoting 13 U.S.C. § 141(a)). This argument, however, ignores both *Wisconsin*'s reasonable-relationship standard and the fact that other, "more specific" sections of the Census Act—namely §§ 6(c) and 141(f)—limit the Department's authority to add questions to the decennial census in ways that are, as with § 195, judicially

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[3] *See also* Reply Brief for Appellants 8, *Dep't of Commerce v. U.S. House of Representatives*, No. 98-404, 1998 WL 801090 ("Section 141(a) establishes as the operative background rule that the Census Bureau may employ whatever means it believes will increase the accuracy of the state-level population counts used in the apportionment process.").

reviewable. *House of Representatives*, 525 U.S. at 338; *see infra* Part I.B.

The Department also cites *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir. 1992), which found a Census Bureau decision nonreviewable. *Tucker* predates and is at odds with *Wisconsin*'s standard. It is, moreover, easily distinguished from this case. The *Tucker* court held that the Department was not required to statistically adjust the results of the 1990 Census because any undercount of certain segments of the population was "merely an accident of the census-taking process," and the Census Act did not provide a standard for adjudicating a "disagreement with the Census Bureau's statistical methodology." *Id.* at 1413, 1418. Here, by contrast, Secretary Ross deliberately chose to include a citizenship question despite repeated and consistent warnings from the Census Bureau career professionals about the question's likely deleterious effect on self-response rates and the overall accuracy of the census. J.A. 111, 114, 116; AR 5474, 5505–06; *see also infra* Part II.A.

More broadly, the conduct of the decennial census is obviously unlike decisions regarding national security or the exercise of prosecutorial discretion—the primary areas in which this Court has found the "committed to agency discretion" exception to judicial review applicable. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988) (national security concerns); *Heckler v. Chaney*, 470 U.S. 821 (1985) (prosecutorial discretion). The census is "closely connected with our commitment to a democratic form of government," and "[t]he reviewability of decisions relating to the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *Franklin*, 505 U.S. at 818 (Stevens, J., concurring in

part and concurring in the judgment). The presumption of reviewability therefore applies with particular force in this context. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 103 (1980) (noting the importance of judicial review in keeping the "channels of change" open).

Finally, the Department suggests in its brief that the fact that Congress requires the Department to submit reports and that the Secretary has testified before congressional committees "confirm" that review lies with Congress, rather than the judiciary. Pet'rs' Br. 23. But these methods of oversight apply to many administrative agencies. If congressional oversight were enough to insulate agency actions from judicial review, the presumption of reviewability would be turned on its head. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("Congress rarely intends to prevent courts from enforcing its directives to federal agencies."). Rather than compete with these methods of oversight, judicial review complements them, ensuring that agencies comply with the obligations that Congress has imposed. *See Bowen*, 476 U.S. at 671 (commenting that, absent judicial review, "statutes would in effect be blank checks drawn to the credit of some administrative officer or board" (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945))). The Court should reject the Department's efforts to reduce to insignificance statutory requirements of this nature by insulating agency decision-making from judicial review.

B. The Census Act Substantively Limits the Department's Discretion to Add Questions to the Decennial Census.

Section 6(c). "[T]o the maximum extent possible and consistent with the kind, timeliness, quality, and

scope of statistics required," the Department must acquire desired information from federal, state, or local administrative records "instead of conducting direct inquiries." 13 U.S.C. § 6(c). The district court accurately summarized how § 6(c) limits the Department's discretion under § 141(a): "If the collection of data through the acquisition and use of administrative records would be as good or better than collection of data through the census, § 6(c) leaves the Secretary no room to choose; he may not collect the data through a question on the census." Pet. App. 266a. Accordingly, the Department lacks the authority to add questions to the decennial census where the data that it intends to obtain through "direct inquir[y]" would not be superior in "kind, timeliness, quality, [or] scope" to data that it could obtain from administrative records. *See* 13 U.S.C. § 6(c).

Without disputing what § 6(c) requires, the Department contends that the provision is not judicially enforceable because it contains no judicially manageable standards. Pet'rs' Br. 45. Tellingly, however, the Department concedes that § 6(c) "might require the Secretary to use administrative records when they are readily available and comprehensive," but not when "the data in those records is . . . incomplete." *Id.* at 46. The Department's claim therefore does not actually question justiciability so much as it challenges the correctness of the district court's analysis in the particular factual context presented in this case.

In addition, the Department argues that Congress could not have intended § 6(c) to require the Department to obtain citizenship data from administrative records because a citizenship question had been included on the decennial census for several decades prior to 1976, when Congress amended the Census Act to

include the provision. Pet'rs' Br. 46 (citing Act of Oct. 17, 1976, Pub. L. No. 94-521, § 5(a), 90 Stat. 2459, 2460). Although the legislative history of § 6(c) is sparse, the Conference Report on the 1976 amendments states that § 6(c) was meant to "direct the Secretary of Commerce to acquire and use to the greatest extent possible statistical data available from other sources" to serve "the dual interests of economizing and reducing respondent burden." H.R. Rep. No. 94-1719, at 10 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 5476, 5477–78; *see also* S. Rep. No. 94-1256, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5465–66 (similar). Congress therefore concluded that some of the questions asked in past decennial censuses should be eliminated by obtaining the desired data from administrative records. The Department points to no evidence that Congress intended to exempt any particular category of data from § 6(c). The Department's obligation to make such determinations continues to govern today as advancing technology makes it easier to obtain higher quality data from a wide range of administrative records that were unavailable in 1976.

Because § 6(c) is justiciable and there is no evidence that Congress intended to exempt citizenship questions from that requirement, the district court properly reviewed the Department's non-compliance with the provision, and found it unlawful.

Section 141(f). The Census Act obligates the Secretary of Commerce to submit to the relevant congressional committees, at specified times, reports regarding the contents of each decennial census. 13 U.S.C. § 141(f). Specifically, the Secretary must submit, at least three years before the "census date" a report setting out all "subjects proposed to be included, and the types of information to be compiled" in the upcom-

ing decennial census. *Id.* § 141(f)(1). Following that, not less than two years before the census date, the Secretary must submit a report regarding all "questions proposed to be included in such census." *Id.* § 141(f)(2). Finally, the Secretary may modify his previously reported plans if he "finds new circumstances exist which necessitate that the subjects, types of information, or questions" be modified and submits another report setting forth the modifications. *Id.* § 141(f)(3). Even the Department acknowledges that these reports are mandatory. *See* Pet'rs' Br. 49.

As the district court recognized, § 141(f) "is plainly intended to facilitate Congress's oversight of the Secretary, thereby enabling the legislature to fulfil [sic] its 'constitutional duty . . . to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States.'" Pet. App. 273a (quoting 1998 Appropriations Act, § 209(a)(1), Pub. L. No. 105-119, 111 Stat. 2440, 2480-81 (1997)). By its terms, the statute restricts the topics and questions on the decennial census to those the Secretary announces to Congress at the prescribed times. These timelines provide the relevant committees with an opportunity to review the contents of the questionnaire and then to convey their views to the Department. Subsection (f)(3) confirms that the statute limits the Department's ability to later add subjects or questions: the statute provides only one scenario in which modifications may be made—if "new circumstances . . . necessitate" such changes—and requires submission of a report to that effect. Congress thereby made clear that the Department may not modify the content of the decennial census after the prescribed dates without both a good reason and notification to Congress.

Section 141(f) reflects Congress's long history of active involvement in determining the content of the decennial census, even as it has delegated the actual conduct of the survey to other governmental actors. Indeed, "the early census acts prescribed the inquiries in each decennial census" directly. U.S. Census Bureau, *Measuring America* 4 (Sept. 2002), https://perma.cc/4GSS-5MNM; *see also* Carroll D. Wright & William C. Hunt, *The History and Growth of the United States Census* 84 (1900), https://www.census.gov/history/pdf/wright-hunt.pdf (noting that, for the 1900 census, Congress limited the inquiries on the decennial census to four topics, while granting the Director of the Census "the entire direction and control of the work"). Although later delegations have given broader discretion to the Secretary to decide subjects and questions, § 141(f) protects Congress's ability to fulfill its constitutional census obligations by overseeing the conduct of the census.

The legislative history of the Census Act of 1976 also demonstrates that § 141(f) was intended to facilitate "the appropriate committees of Congress" in providing "their review and recommendations" regarding the content of the census questionnaire. H.R. Rep. No. 94-1719, at 12. Congress mandated that its committees undertake "advance consideration of the questions" on the census to avoid "unfairly" subjecting census respondents to "questions invading their privacy," H.R. Rep. No. 94-944, at 5 (1976), and to "screen out" questions "that occasionally provoked controversy in the past," 122 Cong. Rec. 9795 (1976) (statement of Rep. Ed Derwinski). Moreover, Congress sought to ensure that constituents concerned about proposed changes to the census questionnaire would be able to participate in the process through their representatives in Congress. *See* H.R. Rep. No. 92-1288, at 4

(1972) (reporting requirement would assure concerned organizations and individuals "that the final census questionnaire represented the input and/or views of many segments of our population followed by a Congressional review"). Section 141(f) cannot fulfill those goals if the list of reported topics and questions provided by the Department is inaccurate or incomplete.

Despite Congress's demonstrated intent to prohibit the Department from adding decennial census topics and questions absent a § 141(f) report, the Department asserts that a violation of § 141(f) is not judicially enforceable. *See* Pet'rs' Br. 49–51. In particular, the Department disagrees with the district court's conclusion that, unlike certain other congressional reporting requirements, the reports required by § 141(f) are "conditions precedent to some other agency action subject to judicial review." *Id.* at 51 (quoting Pet. App. 280a). For the reasons explained above, there is only one condition under which Congress in the Census Act allowed addition of a new subject or question that was not included in a prior report to Congress. Absent compliance with that requirement, the Department cannot include a new question on the census questionnaire. Thus, § 141(f) imposes a substantive constraint on the Department's authority to act. *Cf. City of Alexandria v. United States*, 737 F.2d 1022, 1027 (Fed. Cir. 1984) (federal officials had no authority to enter into a contract where a report-and-wait requirement was not followed). It is therefore unlike the statutes discussed in the cases on which the Department relies. *See Guerrero v. Clinton*, 157 F.3d 1190, 1195 (9th Cir. 1998) (finding no judicial review where the report was "purely informational" and "no legal consequences flow from the report"); *Taylor Bay Protective Ass'n v. EPA*, 884 F.2d 1073, 1080 (8th Cir. 1989) (finding no judicial review where the report merely supported the

agency's "advisory role to Congress"). And, because the legal effect turns only on whether the Secretary has fulfilled his reporting obligation, there is no problem here with "formulating judicially manageable standards." *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 319 (D.C. Cir. 1988).

The Department's argument that § 141(f) has no legal consequences mistakenly relies on the notion that Congress cannot embed an implicit condition on agency action within a reporting requirement. But "[s]tatutory construction . . . is a holistic endeavor," which looks to the broader statutory scheme. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). No clear-statement rule requires an explicit condition, and § 141(f) is not the only statutory reporting requirement with legal consequences implied within its terms. *See* 10 U.S.C. § 652 (requiring the Secretary of Defense to file a report with Congress not less than 30 days before closing or opening a category of military combat unit or position to female servicemembers); *see also* Memorandum from the Sec'y of the Army 2 (Jan. 29, 2016), https://perma.cc/MG7F-PTTQ (noting compliance with 10 U.S.C. § 652 before opening positions in conventional force units to women); *cf.* 28 U.S.C. § 530D(b)(2) (implying, within a reporting statute, a right for the House of Representatives and Senate to intervene in proceedings in which the Department of Justice declines to defend the constitutionality of a federal statute).

The Department's attempt to distinguish § 141(f) from other statutes it admits are enforceable as preconditions to agency action has little merit, as its examples arise in contexts completely unlike the Census Act. For example, the Department cites 10

U.S.C. § 2687(b) and 25 U.S.C. § 1631, which govern the process for closing certain government facilities, requiring the relevant agencies to submit a report on the effects of doing so and then wait a set period before acting on the closure. But this report-and-wait framework would make little sense in the context of the Census Act, which already gives a date for the agency's ultimate action—the statutorily prescribed "decennial census date," 13 U.S.C. § 141(a). Moreover, just as with the report-and-wait provisions that the Department admits are judicially reviewable, § 141(f)'s "reservation of the power to examine" the Department's proposed subjects "before they become effective" allows Congress "to make sure that the action under the delegation squares with the Congressional purpose." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941). The grammatical structure of § 141(f) might be different, but the motivating principle is the same.

Finally, the Department suggests that Congress's alleged awareness of the Secretary's intent to add citizenship as a subject on the 2020 Census is proof that judicial review is unnecessary. *See* Pet'r's Br. 50. But that view is too simplistic. If the Secretary cannot be held accountable under the APA for violations of § 141(f), there is little to stop the Secretary from adding a subject or question to the decennial census without any notification at all, precluding the congressional review that the Department admits the statute requires.

For all of these reasons, judicial review is appropriate here and, moreover, necessary to enforce § 141(f)'s substantive restrictions on the Department's discretion to add topics or questions to the decennial census.

II. THE DEPARTMENT'S ADDITION OF A CITIZENSHIP QUESTION TO THE 2020 CENSUS VIOLATES THE ENUMERATION CLAUSE AND THE CENSUS ACT.

When it added a citizenship question to the 2020 Census, the Department failed to act "in accordance with law." 5 U.S.C. § 706(a)(2)(A). As the district court here found (and as the court in *California v. Ross* confirmed), the evidence in the administrative record demonstrates that the citizenship question will significantly reduce self-response rates among noncitizen households. At the same time, the evidence also uniformly indicates that the Secretary's chosen approach—both asking about citizenship on the census and using citizenship data available from administrative records—would produce *less* accurate citizenship data than using administrative records alone. The addition of the question therefore violates the Enumeration Clause under *Wisconsin*'s reasonable-relationship standard. Moreover, it violates §§ 6(c) and 141(f) of the Census Act, two statutory provisions intended to prevent the Department from adding questions to the decennial census that might undermine the attainment of an actual enumeration.

A. The Department's Own Data Demonstrate that the Citizenship Question Will Reduce Response Rates While Producing Less Accurate Citizenship Data.

The Department contends that Secretary Ross's decision to add a citizenship question was merely a "policy judgment" that weighed an unknown potential impact on response rates against what the Department describes as improved "data completeness and quality" for purposes of DOJ's enforcement of the Voting Rights Act. Pet'rs' Br. 32–35. In his memorandum, Secretary

Ross concluded that there is no "definitive, empirical support" for the proposition that adding a citizenship question to the decennial census would reduce self-response rates. Pet. App. 554a. Furthermore, the Secretary stated that adding "a citizenship question [to] the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request." Pet App. 562a. Both conclusions are unsupported by the administrative record and misapprehend the Department's obligations under the Census Act and the Constitution.

First, as the district court found, the Census Bureau's analysis demonstrates that "the addition of a citizenship question to the 2020 Census will cause an incremental net differential decline in self-responses among noncitizen households of at least 5.8%."[4] Pet. App. 150a; *see also* J.A. 111, 114, 116; AR 5474, 5505–06. The Census Bureau's estimate derived from a comparison of differential self-response rates to the 2010 American Community Survey ("ACS")—which included a citizenship question—and the 2010 Census—which did not—among citizen and noncitizen households. J.A. 111; AR 5505–06. Secretary Ross offered neither a persuasive reason to doubt the predictive value of the Census Bureau's data nor any contrary statistical analysis. *See* Pet. App. 286a (noting that the Bureau's analysis was "the *only* quantitative evidence in the Administrative Record on the effect of

[4] The Census Bureau memoranda in the administrative record originally indicated that the addition of the citizenship question would cause at least a 5.1 percent relative decline in the response rate for noncitizen households. The district court used the 5.8 percent figure because the Census Bureau provided an updated estimate of noncitizen households' non-response rate during the course of litigation. Pet. App. 114a.

the citizenship question on response rates"). He dismissed the Bureau's findings about the 2010 ACS because "response rates generally vary between decennial censuses and other census sample surveys" and hypothesized that the ACS's greater length and reduced follow-up procedures accounted for its lower self-response rate. Pet. App. 553a. But the Bureau took those factors into account by comparing the *relative* decline in response rates between noncitizen and citizen households, J.A. 111; AR 5505–06. Neither the 2010 ACS's length nor its follow-up procedures explain why the falloff in self-response rates between the two surveys was steeper among noncitizen households than citizen households.

The Census Bureau confirmed its analysis by a similar comparison of citizen and noncitizen households' declines in self-response rates to the 2000 Census, only the "long form" of which contained a citizenship question. J.A. 110. The Secretary concluded that this analysis was likewise unpersuasive because it "was not able to isolate what percentage of decline [in self-responses] was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey." Pet. App. 554a. No logical leap is required here: given the potential immigration consequences of being identified by the government as lacking legal immigration status, common sense explains the reluctance of noncitizens to self-identify on a government form. None of the other questions asked on the 2000 long form census is so directly and logically connected to a lower self-response rate among noncitizen households.[5] And Secretary Ross did not

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[5] *See* U.S. Dep't of Commerce, Bureau of the Census, *U.S. Census 2000: Long Form Questionnaire* (2000), https://perma.cc/7TGC-NH2N.

propose an alternative variable that would explain the discrepancy.

Of course, Secretary Ross was correct that the Census Bureau's analysis does not constitute "definitive" proof of what the citizenship question's impact will be on the 2020 Census. The Bureau is staffed by social scientists and statisticians, not prophets. But, given the uncertainties endemic to predictive analysis and the immense constitutional interest in the census's accuracy, the Secretary was obliged to provide a better reason than mere future uncertainty in rejecting his experts' analyses. *Cf. Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1026 (1983) ("Uncertainties about the future . . . do not provide a basis for declining to fashion a decree. Reliance on reasonable predictions of future conditions is necessary to protect the equitable rights of a State."). At the very least, the Census Bureau's analysis raised enough red flags about the citizenship question's potential impact on self-response rates that Secretary Ross should have ordered further study of the issue before jeopardizing the accuracy of the decennial census. This is especially so in light of Census Bureau standards that require pretesting of new questions.[6] U.S. Census Bureau,

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[6] The Department argues that no testing was necessary because the Census Bureau stated that it "would accept the cognitive research and questionnaire testing from the ACS instead of independently retesting the citizenship question." Pet'rs' Br. 40 (quoting AR 1279); *see also* J.A. 108. But the Bureau made that remark in the context of cautioning about the question's impact on self-response rates. *See* J.A. 111. The Department cannot credibly rely on the Bureau's analysis of the citizenship question's performance on the ACS for the proposition that no new testing of the question was necessary while also dismissing that cautionary analysis as inconclusive.

U.S. Census Bureau Statistical Quality Standards 8 (2013), https://perma.cc/95BD-SGYJ.

Second, the district court also correctly found that "every relevant piece of evidence in the Administrative Record supports the conclusion that [the combined approach] would produce *less accurate citizenship data* than" are available from administrative data alone, and "*none* supports the conclusion that [the combined approach] would yield more accurate citizenship data given Secretary Ross's own criteria or the parameters discussed in the [DOJ] Letter." Pet. App. 270a. Secretary Ross therefore failed to justify his decision based on his own metric. *See* Pet. App. 549a.

As set forth in the Census Bureau's analysis and the district court's opinion, asking direct inquiries about citizenship on the decennial census would introduce inaccuracies in the data-collection process in numerous ways. The inclusion of a citizenship question would cause a number of noncitizens to fail to respond, pushing them into "Non-Response Follow Up" operations, which are less accurate than self-responses and would increase the number of individuals who cannot be linked to administrative data. *See* Pet. App. 292a (citing AR 1311). Moreover, the Bureau's data from multiple decades confirm that a significant proportion of noncitizens incorrectly identify themselves as citizens in response to long form census or ACS questionnaires. J.A. 117. So, even assuming that the combined approach would yield a greater *quantity* of data points, that does not mean that the resulting citizenship data would be of better *quality* than the data that could be obtained from administrative records alone.

Secretary Ross articulated only one reason for his conclusion that the combined approach would yield

higher quality citizenship data: this approach would require imputation of citizenship for fewer individuals than the administrative data-only approach. *See* Pet. App. 556a. But there is no support in the record for his apparent belief that imputation results in a higher error rate than self-responses. To the contrary, the district court noted that, although both approaches require imputation of citizenship for millions of individuals, "citizenship data would be imputed from a more accurate source" under the administrative data-only approach. Pet. App. 291a.

B. The Secretary's Decision to Add a Citizenship Question Violates the Enumeration Clause.

As set forth above, *see supra* Part I.A, the Enumeration Clause constrains the Department's conduct of the decennial census. The Department violated key principles articulated in this Court's cases addressing constitutional challenges to past censuses. Although Congress has broad discretion in conducting the census, the census must nonetheless be administered in a manner that "bear[s] . . . a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin*, 517 U.S. at 20. And this Court has recognized that the constitutional analysis must be informed by the Clause's "strong constitutional interest in accuracy," *Utah v. Evans*, 536 U.S. 452, 456 (2002), and "the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804.

Under these principles, the Department's actions violated the Enumeration Clause because they unreasonably deviated from the goal of achieving an accurate count of the country's total population. As discussed, all evidence in the record demonstrated that the Secretary's decision to add the citizenship question

would materially reduce the accuracy of the 2020 census—and there is no indication that a legitimate government objective was served by that choice. The Department thus violated the Enumeration Clause by adding the citizenship question to the 2020 Census. *See California v. Ross*, — F. Supp. 3d —, Nos. 18-cv-1865-RS, 18-cv-2279-RS, 2019 WL 1052434, at *68 (N.D. Cal. Mar. 6, 2019).

The Department's decision to add the citizenship question to the 2020 Census differs markedly from the facts of *Wisconsin*. In that case, the Court held that the Department was not required to statistically adjust the results of the 1990 Census to correct for the undercount of certain segments of the population. *Id.* at 24. A Special Advisory Panel commissioned by the Department had "split evenly" on the question of whether such adjustment would produce a more accurate enumeration.[7] Because some of the Advisory Panel members concluded that statistical adjustment would not produce a more accurate decennial census, the Court held that declining to make such an adjustment was "a reasonable choice" by the Department. *Wisconsin*, 517 U.S. at 23. But here the Census Bureau repeatedly and consistently expressed the view that the addition of a citizenship question to the 2020 Census would negatively impact self-response rates *and* citizenship data quality. Secretary Ross's rejection of the uniform opinion of the experts in the record without any explanation that made sense undermines his claim to reasonable decision-making.

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[7] *Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population*, 56 Fed. Reg. 33,582, 33,582 (July 22, 1991).

In rejecting an Enumeration Clause claim in this case, the district court noted that a citizenship question often has been asked on census questionnaires throughout the country's history. *See* Pet. App. 419a. But not in the last 70 years has such a question been posed to all U.S. residents as part of the decennial census. Pet'rs' Br. 2. And as the district court in the parallel case in California pointed out, "[t]he fact that the citizenship question may have been perfectly harmless in 1950, or that [it] may be harmless again in the year 2050 is of little consequence to the Secretary's constitutional obligations with respect to the accuracy of the 2020 Census." *California v. Ross*, 2019 WL 1052434, at *69. Although historical practice may inform the analysis of the Enumeration Clause, the "strong constitutional interest in accuracy," *Evans*, 536 U.S. at 455–56, outweighs the historical fact of a citizenship question's inclusion at other times and for other purposes.

Nor does this kind of analysis render all demographic questions on the census unconstitutional. As the California district court recognized, "it is well established that each and every question on the census need not relate to the goal of enumeration." *California v. Ross*, 2019 WL 1052434, at *69 (citing *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982)). There is no evidence in the record of this case that the presence of these other questions is likely to result in material inaccuracies or that they were introduced despite the lack of "any legitimate governmental interest in their being asked." *Id.*

C. The Department Has Not Demonstrated that a Citizenship Question Will Yield Higher Quality Data than Can Be Obtained from Administrative Records.

The Department has not articulated any way in which data obtained by adding a citizenship question to the 2020 Census will be superior in "kind, timeliness, quality, [or] scope" than equivalent data obtainable from administrative records. 13 U.S.C. § 6(c). Accordingly, the citizenship question is impermissible under § 6(c) of the Census Act.

In its letter requesting that a citizenship question be added to the 2020 Census, the Department of Justice (DOJ) offered four reasons that ACS citizenship data are purportedly insufficient for its needs:

1. Enforcement of § 2 of the Voting Rights Act (VRA) and redistricting efforts rely upon total population data from the decennial census and citizenship data from the ACS, "two different data sets, the scope and level of detail of which vary quite significantly." Pet. App. 567a.

2. "ACS estimates are rolling and aggregated into one-year, three-year, and five-year estimates" meaning that "they do not align in time with decennial census data." *Id.* at 568a.

3. "Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group." *Id.*

4. "The ACS estimates are reported at a ninety percent confidence level, and the

> margin of error increases as the sample size—and thus, the geographic area—decreases. By contrast, decennial census data is a full count of the population." *Id.* (citation omitted).

Prior to this letter, never in the VRA's 54-year history had DOJ intimated that a citizenship question posed to the entire populace was necessary for proper enforcement of the statute. *Id.* at 124a–25a. Moreover, all of DOJ's reasons for its request can be addressed by obtaining citizenship data from administrative records alone. The Census Bureau proposed "add[ing] the capability to link an accurate, edited citizenship variable from administrative records to the final 2020 Census microdata files," which would address DOJ's concerns about relying on multiple datasets from different time intervals. J.A. 116. The resulting citizenship information would also be available at the same level of detail as information derived from direct inquiries. *Id.* In addition, citizenship data derived from administrative records, like that derived from a citizenship question, would not rely on statistical sampling, unlike the ACS.

Secretary Ross concluded that obtaining citizenship data from administrative records alone could not address DOJ's concerns "because the Bureau does not yet have a complete administrative records data set for the entire population." Pet. App. 555a. He stated that a combined approach of obtaining citizenship records *and also* adding a citizenship question would "provide DOJ with the most complete and accurate [citizenship data] in response to its request." *Id.* at 556a. Secretary Ross's decision therefore boiled down to a conclusion that citizenship data derived from the combined approach would be higher quality than equivalent data obtained from administrative records alone. *See*

13 U.S.C. § 6(c). But, as explained above, the district court concluded that that determination was patently wrong. Pet. App. 268a. Because administrative data would produce data that are of at least as good—indeed better—"kind, timeliness, quality, and scope" than that obtained from direct inquiries, the Department violated § 6(c) of the Census Act.

D. The Department Failed to Satisfy Its Obligation Under § 141(f) Before Adding Citizenship as a Subject on the 2020 Census.

The House does not dispute that the Department timely submitted reports to Congress under 13 U.S.C. § 141(f)(1) and (f)(2) in March 2017 and March 2018, respectively. However, the Department's 2017 § 141(f)(1) report on the subjects planned for the 2020 Census did *not* include citizenship status. AR 204–13; *see also* 13 U.S.C. § 141(f)(1) (requiring a report of "subjects" and "types of information" not later than three years before the census date). The Department's § 141(f)(2) submission reported that the Secretary would add a *question* regarding citizenship to the 2020 Census. U.S. Census Bureau, *Questions Planned for the 2020 Census and American Community Survey* 7 (Mar. 2018), https://perma.cc/SMR3-9KMN; *see also* 13 U.S.C. § 141(f)(2) (requiring a report of "questions" not later than two years before the census date). These were the only reports the Department provided to Congress, although the statute is clear that "if the Secretary finds new circumstances exist which necessitate" modifying the *subjects* "after submission of a report under paragraph (1)," he is required to submit a report to Congress under section 141(f)(3).

As the district court found, the Department violated § 141(f) because it never provided Congress a report

under § 141(f)(3) explaining its intent to modify its 2017 report regarding the subjects planned for the 2020 Census. Nor did the Department ever purport to explain to Congress the "new circumstances" that would justify adding citizenship as a subject to the 2020 Census. The district court therefore correctly concluded that, by adding citizenship as a census subject without satisfying its obligations under § 141(f), the Department violated the APA. *See* Pet. App. 272a–76a.

The Department contends that its § 141(f)(2) report, either alone or in combination with Secretary Ross's earlier memorandum directing the Census Bureau to add a citizenship question, suffices to meet its responsibilities to update Congress under § 141(f)(3). *See* Pet'rs' Br. 52–53. But accepting this argument would render § 141(f)(3)'s limitations meaningless.

The Department's March 2018 report to Congress on the questions for the 2020 Census fails to meet the requirements of § 141(f)(3). It does not purport to state that citizenship is a new subject being added to the 2020 Census or that it is modifying the subjects listed in the March 2017 report. By merely including a citizenship question among the list of questions to be asked, *see* PX-489 at 1, 5, the report fails to meaningfully highlight the critical modification the Department had chosen to make—obviously a key purpose of subsection (f)(3)'s reporting requirement. The Department's litigating position is simply a post hoc justification for its failure to abide by its legal obligations under the Census Act.

The Department also asserts that § 141(f)(3) does not require the Secretary to include in his report a finding of the "new circumstances" that justify the modification. But it would make little sense to explicitly require a report when the Secretary *finds*

that *new circumstances exist* which necessitate a modification of the subjects or questions to be included on the census without also requiring the report to explain those new circumstances and the necessity of the modification. This is especially true when the Secretary is asking Congress to review the proposed changes on an expedited timeline before the census date. Therefore, the Court should read both clauses of subsection (f)(3) together to best serve the oversight goals of § 141(f).

Relatedly, the Department claims that, if § 141(f)(3) does require the Secretary's report to include a finding of new circumstances that necessitate the addition of citizenship as a subject, that requirement was satisfied by the Secretary's earlier memorandum. That memorandum noted that DOJ's request was received in December 2017, after the Department's § 141(f)(1) report had been filed. As an initial matter, only a *report* can satisfy the Secretary's reporting requirement; the statutory obligation is not met by scattering the relevant information in extrinsic materials. But this argument also fails on its own terms. The receipt of DOJ's request is not the kind of "new circumstances" that subsection (f)(3) contemplates. DOJ's request does not purport to be based on any new facts—and certainly none that arose after the April 1, 2017 deadline for subjects to be added to the census. *See* Pet. App. 567a (noting that ACS data have been used since the 2010 redistricting cycle).[8] None of the

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[8] As the district court notes, in April 2016, the Associate Director of Decennial Census Programs issued a memorandum that documented the Census Bureau's plan to transmit to Congress its plans for the 2020 Census and invited agencies to submit requests for data collection by July 1, 2016. *See* Pet. App. 100a (citing PX-271). DOJ's belated request does not include any

Department's explanations excuses its failure to meet its obligations under § 141(f) before adding a new subject to the decennial census.

III. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S JUDGMENT.

As the foregoing analysis shows, the administrative record amply supports the district court's holding that the addition of the citizenship question to the 2020 Census violated the Census Act and therefore was invalid under the APA. Moreover, the record supports the conclusion that the Department violated the Enumeration Clause.

Reversing the district court would undercut the careful framework that Congress has put in place to help provide that each decennial census achieves as nearly as possible an actual enumeration. Although Congress has delegated its authority over the manner in which the decennial census is conducted, its duty to provide for an "actual Enumeration" is nondelegable. *See* U.S. Const. art. I, § 2, cl. 3. Congress relies on statutory constraints like §§ 6(c) and 141(f) to preclude agency actions that will, in Congress's judgment, harm the accuracy of the decennial census. A failure to enforce the Enumeration Clause's and Census Act's limitations on the Department will undermine key protections that Congress has established to provide for an actual enumeration and will risk untethering the administration of the census from its constitutionally defined objective.

Moreover, as the district court found, the addition of the citizenship question will do great harm to the

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explanation for why it failed to meet this deadline when its purported data problem would have been known by this time.

House's institutional integrity and to its efforts to distribute funds appropriately throughout the States. According to the district court, "California residents face a certainly impending loss of representation in the House of Representatives," and "Texas, Arizona, Florida, New York, and Illinois face a substantial risk of losing a seat." Pet. App. 175a. The district court also found that "even under an almost implausibly conservative projection of the net differential undercount of people who live in noncitizen households," several States "will lose some amount of federal funding as a result of the addition of the citizenship question." *Id.* at 180a. Given that Congress allocated roughly $900 billion in just one fiscal year based on census-derived data, the citizenship question is likely to have a very substantial effect on Congress's domestic spending. *Id.* at 178a. This Court should not overrule two district courts and give its imprimatur to an agency decision that reflects such a dearth of careful reasoning while having such an outsized effect on the country and its democratic institutions.

CONCLUSION

For the foregoing reasons, the House respectfully urges the Court to affirm the judgment of the district court.

Respectfully submitted,

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